

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

PJT ENTERPRISES, INC.,

Debtor

CASE NO. 87-00493

Chapter 11

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

Pursuant to Rule 9024 of the Bankruptcy Rules ("Bankr.R."), the Court is called upon to decide the motion of P.J.T. Enterprises, Inc. ("Debtor") to modify its Order of May 4, 1988 and a cross-motion for sanctions by the Benjamin Franklin Savings Association ("BFSA"). Said Order approved a stipulation between the Debtor and BFSA, regarding the use of the Debtor's cash collateral.

While this motion was sub judice, the Debtor brought on an Order To Show Cause for a temporary restraining order pending a hearing requesting a preliminary injunction until the Court ruled on its motion to modify. An evidentiary hearing was conducted October 28, 1988 in Utica, New York, at which BFSA submitted an application for an order of civil contempt. The Court then reserved on the question of injunctive relief and contempt, instructing the parties that a decision on those matters and the underlying motions would be issued within the ten-day duration of the temporary restraining order.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over these core proceedings arising under the Title 11 case of the Debtor pursuant to Code §§1334 and 157(a), (b)(1), (2)(A), (G), (M) and (O), as governed by Bankr.R. 2002, 4001, 7052, 7065, 9011 and 9014.

FACTS

On April 10, 1987, the Debtor, a corporation, whose principal business consists of the ownership and operation of the Holiday Inn in Cortland, New York, filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C.A. §§101-1330 (West 1979 & Supp. 1988) ("Code"). The Debtor's sole shareholder, officer and director is Peter Tutino ("Tutino"), who also acts as its president. It appears that the Chapter 11 filing stayed BFSA's mortgage foreclosure action in state court, commenced on or about February 6, 1987, in which a hearing to appoint a receiver had been scheduled for April 24, 1987. An Order dated April 13, 1987, appointed Grass, Balanoff, Costa & Whitelaw, P.C. ("Balanoff") to act as counsel for the Debtor.

In amended schedules filed May 15, 1987, the Debtor listed \$373,652.62 in priority claims, \$6,465,519.63 in secured claims and \$580,082,49 in general unsecured claims for a total debt of \$7,419,255.00. Debtor listed assets having a value of some \$7,741,671.00 [sic].¹ The largest single secured debt, representing some \$4.2 million in principal, was owed to the Security Capital Credit Corporation ("SCCC") and secured by mortgages on and accounts receivables from the Debtor's Holiday Inn property which the Debtor indicated was its largest asset valued at \$7.8 million. Michael J. Pichel, Esq. ("Pichel") was also listed on the Debtor's Amended Schedule A, as holding a claim

¹ This figure is \$800,000.00 short given the value attributed to the four parcels of real property in Schedule B-1. The total value of real property should be \$8,185,000.00, not \$7,385,000 as listed. This increases the total asset figure to \$8,541,670.81.

for \$125,000.00, secured by "operating expenses."

BFSA, a Texas savings and loan association, filed its proof of claim on September 9, 1987 as SCCC's assignee. The attached documents, including copies of consolidation and assignment agreements and UCC-1 financing statements, indicate it as the holder of two claims secured by blanket liens on the Debtor's real and personal property and all monies flowing from said properties.

One claim is in the amount of \$3,955,371.61, representing a mortgage of \$3,750,000.00 with late charges and interest to the filing date of \$205,371.61, and the second claim of \$435,507.02, is a second mortgage, indicating Tutino as a co-borrower, with \$405,900.00 of the \$450,000.00 principal remaining, and \$29,607.02 of late charges and interest to the petition date. The proof of claim also asserts the inclusion of all collection and enforcement costs and expenses, including attorneys' fees.

On April 30, 1987, pursuant to Code §§105(a), 363(c) and 546(b), BFSA filed a combined notice of lien and motion for the sequestration, turnover and accounting of cash collateral, seeking an injunction against its disposition and use by the Debtor. Said motion contained no return date for a hearing. The Debtor filed a cross-motion on May 5, 1987 for the use of the same cash collateral, in which it represented being in the process of arranging a stipulation with BFSA, and requested a hearing on May 5, 1987 pursuant to Code §363(c)(2)(B), in the event that a stipulation - or interim temporary relief of \$30,000.00 to meet normal day-to-day operating expenses pending a formal stipulation - was not reached with BFSA.

At a hearing held on May 5, 1987, counsel for the Debtor and BFSA orally placed a stipulation on the record which was to be thereafter reduced to writing and submitted to the Court in order form.

On May 14, 1987 BFSA obtained an Order To Show Cause that scheduled a hearing on May 19, 1987 in Syracuse, New York to obtain a permanent injunction against the Debtor's use of its cash collateral, to compel the Debtor to turn over the cash collateral because of BFSA's lack of adequate protection and requesting sanctions, including costs and attorneys' fees, against the Debtor for willfully using the cash collateral post-petition. The attached affirmation by Edward M. Zachary, Esq. ("Zachary"), BFSA's local counsel, stated that prior to the May 5, 1987 hearing, counsel for and an officer of the Debtor had agreed on certain terms and conditions proposed by BFSA to allow the Debtor to use its cash collateral and that he read these terms into the record before the Court at the May 5, 1987 hearing, with the understanding that the Court would execute a proposed order embodying those terms and conditions.

Zachary went on to state that when he presented the document containing those terms and conditions to Debtor's counsel on May 7, 1987, he was told by Debtor's counsel of the Debtor's refusal to execute the proposed Order embodying the stipulation as well as to deliver agreed-upon post-petition financial records. He further recalled Debtor's counsel advising him on May 9, 1987 that the Debtor had spent in excess of \$52,000.00 of the cash collateral on food, bar, payroll, payroll taxes, utilities, room

and office supplies and other miscellaneous operating costs, despite BFSA's limited consent to the Debtor's use of no more than \$30,000.00. Zachary stated that this constituted a willful violation of Code §363(c)(2) inasmuch as the Debtor's use of said monies was expended without the consent of the Court or BFSA.

Also on May 14, 1987, the Court by Order appointed the Debtor's unsecured creditors' committee, naming as members the holders of the seven largest unsecured claims.

Before the hearing was conducted on May 19, 1987 pursuant to the Order To Show Cause, dated May 14, 1987, an Order Providing For Use Of Cash Collateral And Adequate Protection ("Consent Order"), signed by Zachary, Balanoff and Tutino, was submitted to the Court for its approval. The Court signed said Consent Order on May 15, 1987, and a hearing was scheduled for May 26, 1987 to consider and determine any objections of parties in interest to the Order. The Court directed notice of the May 26, 1987 hearing to be served on or before May 19, 1987. The Consent Order stated that objections were to be filed three days prior to the hearing and that it was to remain in effect pending another court order subsequent to the hearing. Consent Order at paras. 13-14. In addition, an Order Vacating The Order To Show Cause, dated May 14, 1987, was signed that same day.

In pertinent part, the Consent Order stated that BFSA claimed a lien upon and security interest in property consisting of the Holiday Inn, the real property it was located on and all other related improvements and cash collateral. Id. at p. 2, para. (d).

It represented that no party in interest other than BFSA claimed

an interest in the cash collateral, which was defined as "rents, royalties, issues, profits, revenues, income and other benefits ... arising from the operation of the Hotel, including, without limitation, all sums paid or payable by guests or occupants of the Hotel in connection with the Hotel's restaurant, bar and health club facilities and the Hotel's rooms", and as constituting cash collateral under Code §363. Id. at p.2, (b) and (e).

The Consent Order set forth the Debtor's acknowledgement of BFSA's valid claim of not less than \$4.3 million dollars, including principal, interest, costs, expenses and legal fees, based upon valid, duly perfected and unavoidable senior mortgage liens on the property and parcel through a consolidation agreement and a second mortgage note. Id. at pp.3-4. BFSA also reserved, among other rights, the right to seek the appointment of a trustee, relief from the stay, relief if the Debtor violated the Order, and any additional funds as an oversecured creditor pursuant to Code §§1104, 362(d), 363(c)(2) and 506(c), respectively. Id. at paras. 10-11.

The Order required the Debtor to maintain and segregate the cash collateral in a separate bank account which it could only use upon the submission to BFSA of a monthly budget detailing revenues and expenses, as of May 1987, and BFSA's approval or disapproval thereof within seven days. In exchange, the Debtor consented to three "initial" payments for May 1987, on June 15, July 15 and August 15, 1987, and "periodic" monthly payments due the first day of each month to commence June 1, 1987 representing interest and two escrow accounts to cover taxes and the replacement of personal

property on the premises, to give BFSA adequate protection. Id. at para. 3.

The Debtor also agreed, inter alia, to provide detailed pre and post-petition budgetary and financial data of its operations, continuing throughout the bankruptcy, submit to depositions and an investigative audit, make no capital expenditures exceeding \$5,000.00 without BFSA's prior written approval, maintain the property, comply with the consolidation agreement, including the required insurance policies, and waive its rights under Code §506(c). Id. at paras. 3(e), (g)-(k), 5, 6. The Consent Order provided BFSA with valid perfected post-petition liens on all the cash collateral held by the Debtor on or acquired after the date of filing, senior to all other liens or security interests asserted against the cash collateral, should the liens and security interests granted to its assignor, SCCC, under the consolidation and mortgage documents not cover the Debtor's post-petition cash collateral. Id. at paras. 3(m) and 4.

The Consent Order further provided for the automatic modification of the stay to allow BFSA to exercise and enforce its rights as SCCC's assignee, including the continuation of its mortgage foreclosure action, if the Debtor failed to 1) make timely initial or periodic payments or provide any of the requested financial information and failed to make cure of either within five days of receiving written notice thereof, or 2) applied for court approval to reject the licensing agreement with Holiday Inns, Inc. Id. at para. 7. The Debtor additionally agreed not to allow any liens equal or senior in priority to

BFSA's liens to arise by virtue of Code §364(d). Id. at para. 8.

BFSA served via regular first class mail written notice of the Consent Order to all creditors on May 19, 1987, as evidenced by a certificate of mailing filed with the Court on May 20, 1987 with an attached mailing matrix.

On May 28, 1987, the Court signed an Order ratifying the prior Consent Order of May 15, 1987, no objections having been made at the hearing on May 26, 1987.

On June 29, 1987, upon BFSA's application, the Court signed an Order To Show Cause requiring Tutino and another officer of the Debtor to appear in Utica July 6, 1987 and explain why contempt and sanctions should not issue against the Debtor and its two officers for the Debtor's alleged failure to comply with certain obligations of the Consent Order, including the agreement to submit to depositions (for which subpoenas were served) and provide certain pre and post-petition financial documents.

The Debtor responded that it had substantially complied with the financial reporting and timely payment requirements of the Consent Order. It alleged that various oral agreements with Zachary modified certain obligations with regard to financial data in the Consent Order and that the instant application was simply part and parcel of BFSA's "sinister" campaign to "harass" the Debtor for what were actually minor or non-existent infractions. After being adjourned to July 21, 1987 and then to August 3 and then August 4, 1987, the application was discontinued.

On December 7, 1987, the Debtor filed an application to sell the Holiday Inn and another parcel of property owned by Tutino

individually (not significant for purposes of this decision) free of liens and encumbrances, pursuant to an agreement entered into on November 25, 1987 between the Debtor, Tutino and Robert A. Banazek & Associates, Inc. for a purchase price of \$6.38 million dollars, to assume a pre-petition contract of sale of with regard to a third parcel of real property and payment of broker's commission, to assume and assign an executory license agreement with Holiday Inns, Inc. and to modify the prior Consent Order. The purchase price included \$180,000.00 for the parcel of property owned by Tutino individually and asked for the authorization to take \$365,000.00 from the sale proceeds to purchase personal property that was part of the contracts to be rejected. The Debtor listed Pichel as one of eight entities, including BFSA, holding mortgages on the Holiday Inn property. As pertinent to the instant motion, the Debtor claimed that it would be unable to sustain its current monthly operating revenues of approximately \$66,000.00 after the Christmas holidays and that this necessitated a change in the Consent Order which now generated a monthly debt service of some \$59,000.00 to BFSA.

The Debtor requested four modifications of the Consent Order: 1) relief from the tax and replacement escrow payments for the months of January, February, March and April 1988, 2) the application of all sums on deposit in the replacement escrow account to the January interest payment, 3) a twenty day grace period to make monthly interest payments due January through April, and 4) the authorization to use \$50,000.00 of the cash collateral to perform repairs and improvements necessary to obtain a permanent

certificate of occupancy from the City of Cortland. The notice of a hearing on this December 7, 1987 application, scheduled for December 22, 1987, was mailed to all creditors listed in the mailing matrix on December 9, 1987 by first class mail, as evidenced by the affidavit of service filed on December 10, 1987.

On December 22, 1987, the Court signed an Order authorizing the Debtor to employ Lee & LeForestier, P.C. to replace Harvey, Harvey, Mumford & Kingsley, Esqs. The latter firm had been appointed as interim counsel in an Order dated August 4, 1987 subsequent to the removal as counsel of Grass, Balanoff, Costa & Whitelaw, P.C. in an Order dated July 10, 1987.

Subsequent to the hearing on December 22, 1987, the Court signed an Order dated December 28, 1987 ("First Modification Order") and approved a modification of the Consent Order of May 15, 1987, as consented to by the Debtor and BFSA. The modifications were as follows: 1) each periodic payment was now due on or before the fifteenth of every month, 2) the use of funds in the replacement escrow account for work necessary to obtain a permanent certificate of occupancy with each fund request to be accompanied by an affidavit by the Debtor describing the work, the contractors, contractor estimates and invoices and copies of any documents submitted to the City in furtherance of the permanent certificate, 3) the removal of the five-day cure provision on the failure to timely comply with the Consent Order's financial reporting or payment requirements and triggering the automatic lifting of the stay, 4) the lifting of the stay by April 1, 1988, should the Debtor fail to pay BFSA its allowed claim pursuant to a

Court Order authorizing such payment, 5) no further extensions, injunctions, stays or modifications that would prevent BFSA from exercising and enforcing its rights and remedies as delineated by the instant Order, and 6) that time was of the essence with regard to the Debtor's obligation to make the periodic payments and pay BFSA its allowed amount by April 1, 1988. No further notice of said First Modification Order was given.

The Court also approved the sale of the Holiday Inn and the second piece of real property owned by Tutino individually to the Banazek concern free and clear of all liens and encumbrances in a separate Order dated December 28, 1987 ("Sale Order"). A hearing on objections to the Sale Order was scheduled January 12, 1988 and upon the objection of one of the secured creditors, an amended application to sell was submitted to and then signed by the Court on January 22, 1988.

On March 24, 1988, Holiday Inns, Inc. filed notice of a motion for an order dismissing the Debtor's Chapter 11 case or converting it to one under Chapter 7, to modify the stay to allow it to exercise its termination rights and for the allowance as an administrative claim its post-petition franchise claim in an amount exceeding \$96,000.00. A hearing was scheduled for April 5, 1988. In an Order dated April 22, 1988, the Court allowed an administrative claim of Holiday Inns, Inc. in the sum of some \$101,000.00 and conditionally granted that portion of the motion seeking a modification of the stay if the Debtor did not file a disclosure statement and plan by April 12, 1988 and cure the \$96,000.00 plus of administrative claims by making five weekly

payments of \$10,000.00, commencing April 4, 1988 and then weekly payments of \$7500.00 until paid in full. All other relief sought was denied.

On April 13, 1988, the Debtor filed a Disclosure Statement and Plan, both dated April 12, 1988. The proposed Plan was of a liquidating nature and called for the sale of the Holiday Inn at a minimum price of \$5.7 million dollars by September 30, 1988. The Disclosure Statement set forth a revised valuation of the Holiday Inn at \$6.2 million dollars, including an allowance of \$400,000.00 for leased property, and noted that the Banazek sale never materialized due to Banazek's inability to pursue a franchise from Holiday Inns, Inc. or to acquire suitable management. The Disclosure Statement described SCCC "as the mortgage servicing agent of Benjamin Franklin Savings Association (BFSA) and two other participating banks." Disclosure Statement at 4 (Apr. 12, 1988).

On April 13, 1988, the Court signed an Order removing four members of the creditors committee and directing that four new members be added. The Order was entered on the Debtor's unopposed motion.

On April 25, 1988, the Court signed an Order appointing the Whitney Ryan & Gallinger Real Estate Inc. as non-exclusive realtors with authority to sell the Holiday Inn, subject to Court approval.

It appears that the same Disclosure Statement was filed again on April 27, 1988.

On May 3, 1988, the Debtor submitted to the Court a stipulation

dated April 14, 1988 executed by the Debtor, its counsel and BFSA's counsel seeking the Court's approval of a stipulation between BFSA and the Debtor which recited both parties' desire to sell the Holiday Inn through the Chapter 11 proceeding and, if unsuccessful, then by Referee sale in the foreclosure action. This stipulation, which referred to both the Consent Order and the First Modification Order provided for 1) the Debtor's waiver of any objection to BFSA's claim including \$4,155,900 in unpaid principal, \$346,582.07 in accrued and unpaid interest through March 31, 1988, the sum amounting to unpaid interest accruing on and after April 1, 1988 to the date of payment of BFSA's claim at the default rate of interest, all collection costs as set forth in consolidation agreement and all second mortgage collection costs as may be allowed by Court, 2) the Debtor's aggressive advertising and marketing of the Holiday Inn and submittal to the Court and BFSA monthly reports describing such efforts, 3) the extension of the Consent Order through September 30, 1988, including the continuation of monthly periodic payments, 4) the lifting of the stay on April 1, 1988, as set forth in the First Modification Order, to remain unchanged, 5) the Debtor's agreement to withdraw all defenses and counterclaims to BFSA's foreclosure action in state court and consent in writing to an entry of foreclosure judgment in sum of BFSA's allowed secured claim in its Chapter 11, 6) unconditional and complete general releases by Debtor and Tutino to BFSA, SCCC and Norstar Bank of Central New York from all claims or causes of action which might have arisen in events leading up to instant stipulation, 7) the Debtor's failure to meet

the terms of the stipulation with Holiday Inns, Inc. as constituting an additional act of default and BFSA's right to proceed in prosecuting the state court foreclosure action, 8) absent default, the agreement by BFSA not to move for appointment of receiver in state foreclosure action, schedule a Referee's sale on or before September 30, 1988 or advertise or publish the Referee's Sale before August 15, 1988, and 9) the binding nature of the within Order on all parties in the Chapter 11 case and the state court foreclosure action. In an Order dated May 4, 1988, the Court approved the stipulation of April 14, 1988 ("Second Modification Order"). It does not appear that any notice of this Second Modification Order was given to any creditors other than BFSA.

At the hearing on June 21, 1988, the Court approved the Debtor's Disclosure Statement.

In an Order dated August 3, 1988, the Court approved a modification of its Order of April 22, 1988 conditionally dismissing the Chapter 11 case and entered upon the stipulation between the Debtor and Holiday Inns, Inc. This was done in order to reduce the Debtor's weekly payment for June 6, 1988 to \$1,000.00, to \$5,000.00 for June 13, 1988 and thereafter for weekly payments to be in the sum of \$9,000.00.

On September 16, 1988, Ryan filed a letter with the Court ex parte in which he enumerated seventy-seven sale prospects he had been investigating since January. See Letter from Whitney H. Ryan to Judge Stephen Gerling (Sept. 7, 1988). He wrote of three particularly promising leads, including a tentative offer by a

Stephen A. Burn for a proposed price of \$6.3 million dollars for which he enclosed correspondence. Id. Ryan stated that "if given enough time I will be able to sell this property." Id. at p.2.

On September 20, 1988, the Debtor filed notice of the instant motion, basically seeking to modify the termination of the automatic stay as to BFSA's pursuit of the appointment of a receiver or a referee's sale in the state court foreclosure action. The Debtor requested an extension of the stay as to these two acts to February 1, 1989, from its prior extension of September 30, 1988 in the Second Modification Order (which had been extended from April 1, 1988, as set out in the First Modification Order). The Debtor sought four months to file a modified plan and execute a fairly negotiated sale of its hotel. This motion to modify was accompanied by an application to shorten the notice period to seven days, pursuant to Bankr.R. 9006(c), and to limit the scope of the notice to the United States Trustee, BFSA, through its local and regular counsel, the creditors named as defendants in the state foreclosure action, and the Debtor's twenty largest unsecured creditors listed per Bankr.R. 1007(d). The Court approved the application to shorten the notice and scope of the motion in an Order dated September 20, 1988 and scheduled a hearing on September 27, 1988. The affidavit of service regarding the notice of motion to modify the Second Modification Order, as filed September 22, 1988, did not appear to include BFSA's local counsel.

BFSA filed an affirmation in opposition to the Debtor's

modification request and a cross-motion for sanctions pursuant to Bankr.R. 9011 on September 30, 1988. The attached affidavit of service indicated mailings made to the United States Trustee and Debtor's counsel.

At the September 27, 1988 hearing, the parties agreed to an adjournment until October 11, 1988. On that day, the motion and the cross-motion were argued, whereupon the Court allowed both parties until October 14, 1988 to submit memoranda of law, which time was subsequently extended to October 17, 1988 after which the matter would be considered taken under advisement.

At the argument of the motion on October 11, 1988, a series of identical documents were filed by eight creditors, including Pichel, evincing support of the Debtor's motion to modify its stipulation with BFSA and further advocating the vacating of the December 28, 1987 First Modification Order and the Second Modification Order of May 4, 1988 for the failure of both to comply with Bankr.R. 4001(d). These creditors also sought a valuation hearing to determine if BFSA was entitled to post-petition interim interest payments and asked for disgorgement in the event said payments were not allowable.

Memoranda of law were filed by counsel for BFSA, the Debtor and Pichel pro se.

On October 25, 1988, the Court signed an Order To Show Cause submitted by Debtor's counsel seeking to preliminarily enjoin the appointment of a receiver in the state court foreclosure until the Court's resolution of its motion to modify the Second Modification Order pursuant to Bankr.R. 9024. The Court approved the issuance

of a temporary restraining order and scheduled an evidentiary hearing October 29, 1988 in Utica. BFSA filed an application in response to the Order To Show Cause on October 25, 1988.

At the evidentiary hearing on October 25, 1988, the Court clarified the Debtor's motion as seeking solely to enjoin the appointment of a receiver pending the disposition of the underlying motion to modify. The Debtor called Clara Pace, the Holiday Inn's executive chef, and Tutino as witnesses to demonstrate that the appointment of a receiver would result in the departure of key employees and their expertise and contacts in the community at the Hotel's busiest time of year, which would then result in a substantial decrease in food and bar revenues. Tutino also testified as to the historical and current operating costs of the Holiday Inn. Then on cross-examination of BFSA's witnesses and during closing argument, the Debtor compared those costs to the projected costs of a receiver and its management team. Tutino attested to his vital role in operating the hotel, in terms of his technical and business knowledge, his "on-site" managerial style and his personal stake in the entire operation. On cross-examination, he claimed that he was being forced by the first mortgagee, BFSA, to sell the hotel and that a sale through BFSA would generate substantially less than if he sold it.

In support of its position that no harm would inure to the Debtor if a receiver was appointed, and if there was any harm, it could be adequately compensated by money damages and hence was not irreparable so as to meet the Second Circuit's standard for granting a preliminary injunction, BFSA called Joel W. Hiser

("Hiser"), the individual it has chosen as receiver, pending approval by the state court, and Walter L. Isenberg, a principal in Sage Development Resources, Inc., a management services company that Hiser's firm, Metric Partners, plans to retain to operate the Holiday Inn.

At the start of the evidentiary hearing, BFSA also filed an Application For Order Of Contempt without a return date and served a copy on the Debtor's counsel. Debtor's counsel has since responded in an Affirmation in Opposition filed November 2, 1988.

At the close of the evidentiary hearing on October 29, 1988, the Court continued the temporary restraining order and instructed the parties that a decision on all matters formally raised in the motions for injunctive relief and for modification of the Second Modification Order would be handed down on or before the tenth day of the temporary restraining order, November 3, 1988.

A hearing on the approval of a modified disclosure statement is scheduled for November 22, 1988, its filing on October 7, 1988 having been accompanied by a modified plan. Both documents parallel their predecessors but for the following: 1) the modified plan calls for Pichel to lend the Debtor the sum of \$1,505,900.00 - \$1,155,900.00 to apply towards a partial payment of BFSA's claim and \$350,000.00 to replace the personal property which were the subject of the rejected leases, and 2) the Debtor's continued operation of the Holiday Inn pending the sale at a minimum net price of six million dollars. Disclosure Statement at 19-20 (Oct. 6, 1988) (discussing Article VI as the most important part of the

Plan).

DISCUSSION

It is clear that the three motions presently before the Court arise out of an uneasy alliance forged between the Debtor and its largest creditor through the execution of the three related Court-approved documents pertaining to the use of cash collateral in exchange for adequate protection - the Consent Order of May 1987, the First Modification Order of December 1987 and the Second Modification Order of May 1988.

I. Debtor's Motion to Reconsider Pursuant to Bankr.R. 9024

The Debtor maintains that the Court, as a court of equity, has broad powers pursuant to Bankr.R. 9024 to set aside a prior stipulated Order regarding relief from the stay. In support thereof, it relies on an "unforeseen circumstances" rationale, as put forth by the court in In re Johnson & Morgan Contractors, 29 B.R. 372 (Bankr. M.D.Pa. 1983). BFSA maintains that the Debtor is attempting to stall the inevitable foreclosure proceeding and is facing the historically slow season in the fall and winter that will only increase its administrative expense payments. BFSA also asserts that the Debtor's Modified Plan is unconfirmable because a "cramdown" will be necessary and even then it will not provide for payments totalling the allowed amount of BFSA's claim.

The Court notes that the Second Circuit interprets Fed.R.Civ.P. 60(b), as incorporated by Bankr.R. 9024, as a vehicle to be broadly construed to achieve "substantial justice" and grant

"extraordinary judicial relief ... upon a showing of exceptional circumstances." See Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986). Accord In re Creed Bros., Inc., 70 B.R. 583, 586 (Bankr. S.D.N.Y. 1987); In re Chipwich, Inc., 64 B.R. 670 (Bankr. S.D.N.Y. 1986).² "In deciding a Rule 60(b) motion, a court must balance the policy in favor of hearing a litigant's claims on the merits against the policy in favor of finality." In re Kotlicky v. U.S. Fidelity & Guar. Co., 817 F.2d 5, 9 (2d Cir. 1987) (citing to 11 C.Wright & A.Miller, FEDERAL PRACTICE AND PROCEDURE ¶2857 (1973)).

Thus, final judgments should not be "lightly reopened" since the Rule is not a substitute for a timely appeal. See Nemaizer v. Banker, supra, 793 F.2d at 61.

Moreover, the standard for granting relief from an order vacating or modifying a stay is also one of exceptional or extraordinary circumstances and encompasses the threat of irreparable harm. See In re Terramar Mining Corp., 70 B.R. 875 (Bankr. M.D.Fla. 1987); Jones v. Wood (In re Wood), 11 B.C.D. 111 (Bankr. D.Idaho 1983).

The record before the Court does not demonstrate exceptional circumstances nor does it disclose facts meeting the more liberal standard of "unforeseen circumstances". In fact, the Court notes that the series of events leading up to the two instant motions were precisely the kind of scenario the Consent Order, the First Modification Order and the Second Modification Order were executed to stave off. Additionally, the record demonstrates that any

² Since the Debtor has not specified the sections of Fed.R.Civ.P. 60 its motion proceeds under, the Court will treat it as falling within the purview of subsection (b).

loss the Debtor might sustain from the denial of its motion to modify would be of a monetary nature - this does not constitute the "irreparable damage" necessary to invoke the doctrine of extraordinary circumstances under Fed.R.Civ.P. 60(b). Cf. Feit v. Drexler, 760 F.2d 406, 416 (2d Cir. 1985).

Further, no credible evidence has been put forth to support the conclusory allegations made by the Debtor in its papers of BFSA's interference with the tentative sale to Burn. See, e.g., In re Alpha Industries, Inc., 84 B.R. 703, 706 (Bankr. D.Mont. 1988). Absent competent proof relative to these alleged interferences, which perhaps might have risen to the level of extraordinary circumstances necessary to grant the Debtor's motion, nothing can alter the consequences of the Consent Order, the First Modification Order and the Second Modification Order entered into between the Debtor and BFSA between May 1987 and May 1988.

It may be that the Debtor bargained fiercely for the right to sell the Holiday Inn - but it has had more than seventeen months to accomplish that sale. On the record before the Court, it is no closer to that sale today than it was on May 15, 1987, the date of the Consent Order. While concerned about the costs attendant to the appointment of a receiver and his installation of a management team to actually operate the Holiday Inn in Cortland, New York, the Court can see the very real prospect of these same events happening in four months, when the Debtor may very well be unable, once again, to sell the hotel before the next deadline. The Court also finds BFSA's observations with regard to the spectre of rising administrative expenses in the slower winter months and the

nonconfirmability of the plan given the treatment of its claim, well-taken. Indeed, all indications - from the several leases being rejected to the various pending motions to lift stay - point to the escalating precariousness of the Debtor's financial condition as the hotel slowly depreciates in value and accumulates costly franchising obligations to Holiday Inns, Inc.

Pichel's objections based on the failure to comply with Bankr.R. 4001(d) with respect to the First Modification Order and Second Modification Order are without merit. Both of these documents are inextricably part of the Consent Order, dated May 15, 1987, well prior to the August 1, 1987 effective date of the Bankruptcy Rule amendments which added Bankr.R. 4001(d). Additionally, creditors were given notice of the motion which resulted in the First Modification Order, notwithstanding the inactive status of the creditors' committee.

In any event, the notice requirements of Bankr.R. 4001(d) are not applicable to the two modifications of the Consent Order, which was properly noticed under Code §363 and the rule in existence at the time it was entered and whose terms and conditions remained in effect throughout. Moreover, the record does not disclose that any creditors other than BFSa had an interest in the cash collateral.³ See e.g., Owens-Corning Fiberglas Corp. v. Center Wholesale, Inc. (In re Center Wholesale, Inc.), 759 F.2d 1440, 1448-1450 (9th Cir. 1985). Thus, all three

³ There is no documentation on the record or in any documents in the Court file to explain or substantiate Pichel's lien on "operating expenses", which conceivably could constitute cash collateral.

Orders were rendered in a manner consistent with due process and cannot be attacked for voidness under Fed.R.Civ.P. 60 (b)(4). See In re Downtown Investment Club III, 17 B.C.D. 996, 998 (Bankr. 9th Cir. 1988) (citing to In re Center Wholesale, Inc., supra, 759 F.2d at 1448 and Wright & Miller, FEDERAL PRACTICE & PROCEDURE ¶2862 at 199-200 (1973)).

Requiring the two modifications to comply with Bankr.R. 4001(d) would indirectly result in its retroactive application to the "root" Consent Order and interfere with those antecedent rights and obligations as stipulated to in May 1987. The Court simply cannot vacate two Orders that clearly "related back" to an earlier Order absent some manifest indication by the drafter's that Bankr.R. 4001(d), which is a substantial amendment, should be retroactively utilized. See, e.g., In re Bullington, 80 B.R. 590, 595 (Bankr. M.D.Ga. 1987)(quoting Union Pacific R. Co. v. Laramie Yards Co., 231 U.S. 190, 199 (1913) in Chapter 12 context). While Bankr.R. 4001 was amended to accomodate the significant changes of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L.No. 98-353, 98 Stat. 333 (1984), there is no indication of an intention to give it retroactive application. See Bankr.R. 4001(d) advisory committee's note (1987).

Moreover, the Court observes the high probability that numerous creditors and parties in interest have changed their positions in reliance upon these three related documents in the past seventeen months so that the setting aside of any one of them would work a greater prejudice than it would prevent. The Court is also not

convinced that the cash collateral and adequate protection arrangements embodied in all three referenced Orders worked to the detriment of the unsecured creditors, whose interest Bankr.R. 4001(d) is apparently designed to protect. Cf. In re Sprull, 78 B.R. 766, 772 n.15 (Bankr. W.D.N.C. 1987). Additionally, in conformity with its inherent responsibility to scrutinize every document brought before it for approval so as to ensure that the best possible balance between the competing interests of all the parties-in-interests - debtors, creditors with secured and unsecured claims and equity security holders - has been reached, the Court rigorously studied the three Orders at issue here prior to signing.

Pichel's reliance on the equitable subordination principles of Code §§509 and 510 and his implication of BFSA's "unclean hands" because of a refusal to disclose the contents of the participation agreement and to allow being "cashed out" by himself are also misplaced. Not only are his allegations totally unsupported by any credible evidence, as indicated above, but the Court finds no authority to allow it to force a creditor to accept a contract, in this instance with an entity who appears to be closely affiliated with the Debtor so that the proposed "buy-out" is scarcely an "arms-length" transaction.

The Debtor's reliance on its timely payments to BFSA pursuant to the three Orders is likewise of no moment. This is the price the Debtor paid in consideration for a seventeen month period in which to locate a buyer while still operating the Holiday Inn. Furthermore, oversecured creditors such as BFSA are entitled, on

application to the Court, to adequate protection payments under Code §§361, 363 and 506(b). See generally, United Saving Ass'n Of Texas v. Timbers Of Inwood Forest Associates, Ltd., ___ U.S. ___, 108 S.Ct 626 (1988).

The Debtor now seeks to fight a battle it perhaps should have fought seventeen months ago, prior to its entering into the series of stipulations which sought to obtain BFSA's consent to delay pursuit of its foreclosure action in state court. The Court cannot grant the Debtor that relief and, in effect, give the Debtor one more "bite of the apple."

The Court's broad equity powers are similarly unavailing to the Debtor. Equity has its limits and must be exercised in a manner consistent with the Code. See Norwest Bank Worthington v. Ahlers, ___ U.S. ___, 108 S.Ct 963 (1988); Johnson v. First National Bank of Montevideo, Minn., 719 F.2d 270, 273 (8th Cir. 1983), cert. denied 465 U.S. 1012 (1984). Code §105(a) is not "a roving commission to do equity." United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986).

Stipulations entered into by parties represented by counsel and thereafter approved and entered by the Court so as to be effective Orders cannot be vacated absent extraordinary circumstances. Any other conclusion would violate the consensual spirit of Chapter 11, erode public confidence in the Code and undermine "the certitude of contracts" and the integrity of the entire judicial system.

II. BFSA's Cross Motion For Sanctions Pursuant to Bankr.R. 9011 and Its Unnoticed Application for Order Of Contempt

By virtue of the Debtor's motion to modify the Second Modification Order, BFSa argues its entitlement as a matter of law to sanctions and, more recently, to an order of contempt. The Debtor opposes both applications and characterizes the second as duplicative of the first.

The Court finds that after a reasonable inquiry well grounded in fact, the Debtor's counsel, Thomas A. Dussault, Esq. ("Dussault"), embarked upon a good faith argument for the extension of existing law in the Second Circuit with respect to Fed.R.Civ.P. 60 and that the motion to modify was not interposed for any improper purpose.

Given the fact that Dussault was appointed some seven months subsequent to the execution of the Consent Order by the Debtor's first attorney, he was, in many respects, bound to a situation he did not create. The Court finds that Dussault consistently endeavored in a reasonable manner to make the best of what he found upon his appointment and service his client.

Dussault's conduct meets the objective standard of "reasonableness under the circumstances" that Rule 11 and its bankruptcy analogue Bankr.R. 9011(a) require. See Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253-254 (2d Cir. 1985); Golden Eagle Dist. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986); Mazzocco v. Smith (In re Smith), 82 B.R. 113, 114 (Bankr. D.Ariz. 1988). "Courts must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer." Eastway Constr. Corp. v. City of New York, supra, 762 F.2d at 254.

Moreover, this Court is of the belief that Bankr.R. 9011(a) is to

be used sparingly so as not to chill vigorous advocacy or stifle creativity - both of which are essential to the law. Id.; Giardo v. Ethyl Corp., 835 F.2d 479, 482-485 (3d. Cir. 1987); Shamovonian v. Lewis (In re Lewis), 79 B.R. 893 (Bankr. 9th Cir. 1987);

Thus, on the facts before it, the Court finds no litigation abuse such as to warrant the mandatory imposition of sanctions under Bankr.R. 9011. See Schwarzer, Rule 11 Revisited, 101 Harv.L.Rev. 1013, 1020 (1988). See also Giardo v. Ethyl Corp., supra, 835 F.2d at 485; Donaldson v. Clark, 819 F.2d 1551, 1557 (11th Cir. 1987).

Nor does it find an order of civil contempt to be appropriate inasmuch as the Debtor has not willfully violated nor defied any order issued by this Court and has, in fact, diligently sought relief in the bankruptcy forum. That the Debtor now seeks to postpone the appointment of a receiver, an action it had agreed on in the pre-petition consolidation agreement with SCCC, is not binding in this Court. The covenant's general incorporation in the consent Order at paragraph 3(j), in the First Modification Order at paragraphs 7, 15 and 16 and in the Second Modification Order at paragraphs 4, 7 and 8, does not clash with this result, inasmuch as there is still no specific Order from which compliance needs to be coerced. See 17 AM.JUR.2d ¶4 (1964); see also United States v. Stewart, 571 F.2d 958, 963 (5th Cir. 1978). This is so, notwithstanding the potential inconsistency with the three Orders such compliance and performance with regard to the appointment of a receiver might engender and, under the terms of the Consent Order, fall.

BFSA's reliance on the provision in the First Modification Order against any further modifications or injunctions so as to warrant sanctions or an order of civil contempt is not compelling. This is so because in entering into the stipulation, which became the Second Modification Order of May 4, 1988 further modifying the Consent Order, both parties entered into a binding contract modification that implicitly vitiated the prohibition against modification provision. Thus, BFSA has waived any right to enforce that provision and is now estopped from reliance thereon.

See 28 AM.JUR.2d Estoppel and Waiver ¶1-3, 30, 154-156 (1966).

The course of conduct between the Debtor and BFSA in the four months subsequent to the Second Modification Order, in treating the three Orders with equal validity, evidences a mutual intention supporting this conclusion.

III. Debtor's Motion For Injunctive Relief

By reason of the foregoing, this issue is moot.

Accordingly, it is hereby

ORDERED:

1. That the Debtor's motion to modify the Second Modification Order of May 4, 1988, pursuant to Bankr.R. 9024, is denied.

2. That BFSA's cross-motion for sanctions, pursuant to Bankr.R. 9011, and its application for an order of civil contempt are denied.

3. By virtue of this resolution, the temporary restraining order is hereby dissolved and no further injunctive relief can lie.

Dated at Utica, New York
this 3rd day of November, 1988

STEPHEN D. GERLING
U.S. Bankruptcy Judge